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IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1010~~ 147

MMISSIONER OF INTERNAL REVENUE,

Plaintiff and Respondent,

vs.

LSHIRE HOLDING CORPORATION,

Defendant and Petitioner.

PLY OF PETITIONER TO RESPONDENT'S BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1956.

No. 1040

COMMISSIONER OF INTERNAL REVENUE,

Plaintiff and Respondent,

vs.

WILSHIRE HOLDING CORPORATION,

Defendant and Petitioner.

REPLY OF PETITIONER TO RESPONDENT'S BRIEF.

Respondent erroneously contends that Wilshire Holding Corporation, under the terms of the lease, pays Ten Dollars ($10.00) for title to the property at the end of sixty-eight years (Resp. Br. p. 7); however, respondent has failed to meet the facts and argument presented by petitioner as to the real consideration for transfer of title.

The real consideration consists of:

1. The transfer of title of two lots by petitioner's predecessor in interest to Walburga Oesterreich, which cost $19,650.00, as compared to the three lots owned by Oesterreich which cost her $24,235.05 (Pet. for Writ, p. 18; Stip. par. 4, pp. 34, 32-33).

2. Additional ground rental to Oesterreich by virtue of obtaining additional rental for the theater due to the

two lots purchased by petitioner's predecessor, so as to build a building large enough to accommodate a motion picture theater of the size which was constructed (Pet. for Writ, p. 18).

3. The lease was changed during the negotiations wherein Oesterreich was given the advantage of additional funds during an earlier period of the lease, so she would receive the benefit of higher rents during her lifetime (Pet. for Writ, pp. 18-19).

Respondent also fails to answer the fact that the value of the reversionary interest based on an appraised value of the land in 1929 (the date of the lease) of $50,000.00, only amounted to $266.78 (Pet. for Writ, p. 20).

Respondent erroneously refers to the value of the land as $100,000.00. However, that was the value placed on the property in 1946 and at the time of the hearings before the Tax Court. The value of the land at the time of the execution of the lease in 1929 was found to be $50,000.00 (p. 178; Dep. pp. 18, 46; p. 74; Pet. for Writ, pp. 22, 21).

Respondent contends that it is virtually indisputable that taxpayer will exercise its right to acquire the land at the end of 68 years (Resp. Br. p. 7), but that is engaging in an assumption which does not necessarily hold true.

It should be kept in mind, as pointed out in the Petition for Writ, that this is a single purpose building with the main tenant a motion picture exhibitor. What the future holds for the motion picture exhibiting business in 1997, is open to conjecture, particularly with the advances made by television, and with pay-television just around the corner, to be subscribed for by people who will be able to

watch the latest motion pictures in their own homes. It is a matter of common knowledge that literally thousands of motion picture theaters have been closed throughout the United States in recent years because of insufficient business to justify their continued operation.

Whether the building, in 1997, would be razed because of its unsuitability at that time is something that cannot be determined now; without the principal purpose of the building, to-wit, a motion picture theater, the income from the building would not be sufficient to pay the ground rental payments, taxes and operating expense. Therefore, there is no reasonable certainty that the taxpayer will be in possession of the property in 1997.

Further, it should be noted that title to the property will not pass if there should be a default under the terms of the lease, or if the transaction is not completed in 1997.

Respondent infers in answer to taxpayer's contention (Resp. Br. p. 8, footnote 3), that the rental payments are not too much to pay for possession for 68 years plus title at the end of the period. If the inference is justified, then the logical question arises—what proportion of the payments should be allocated to possession, and what proportion of the payments should be allocated to the transfer of title. It is manifestly unfair to allocate all of the $679,000.00 required to be paid under the terms of the lease to the acquisition of title for a parcel of land found to be worth only $50,000.00 at the time the lease was executed in 1929.

It is interesting to note that respondent finds itself in a most inconsistent position. It now urges that the instrument of September 11, 1929, is not a lease but an instrument providing for the sale of the land. However, respondent's brief on pages 8-9, in the companion case of

Walburga Oesterreich v. Commissioner of Internal Revenue, United States Court of Appeals for the Ninth Circuit, No. 13924, stated:

> "However, that evidence is reasonably susceptible of the inference that the taxpayer did not consider inadequate the consideration for which she agreed that the fee would be conveyed to the 'lessee' upon termination of the long-term 'lease,' because the taxpayer had no relatives or anyone else whom she wished to inherit the property and, being concerned only with a large income from the property during her lifetime, did not care what happened to the fee 68 years in the future.
>
> In their conduct for over 19 years subsequent to execution of the agreement, the parties consistently treated the instrument as a lease and not an installment sale contract. This conduct is strong evidence of their intention and the record does not support the taxpayer's assertion that they labored under a mutual mistake of law.
>
> Under the circumstances, the Tax Court's conclusion that the agreement of September 11, 1929, was a lease and not an installment sale contract is not clearly erroneous. Its decision should, accordingly, be affirmed.",

and on pages 11 and 12:

> "There being no obligation on the part of the 'lessee' to buy, however, its right to do so did not in itself convert the instrument into a sale contract as a matter of law. See Lawlor v. Commissioner, 78 F. 2d 567 (C. A. 9th). Accordingly, to determine whether the parties intended a lease or an installment sale contract it becomes necessary to examine the circumstances surrounding the execution of the agreement of September 11, 1929, and the conduct of the parties in carrying it out.

Testimony on behalf of both the taxpayer and Wilshire Holding Corporation as to the circumstances surrounding the execution of the agreement of September 11, 1929, indicates that initially a lease and not a sale was contemplated by the parties [R. 84-85, 102-103, 145-146];"

and on page 13:

"For a period of over 19 years from the time the agreement of September 11, 1929, was executed until some question as to its nature was raised by an internal revenue agent [R. 16-20], the parties by their conduct consistently treated the instrument as a lease.";

and on page 14:

"We have found no evidence of record to support the taxpayer's conclusion . . . that (the) conduct of the parties was due to a mutual mistake of law. . . . The decision of the Tax Court is correct and should be affirmed."

Respectfully submitted,

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